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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 537

ARTHUR C. HARVEY COMPANY,
Petitioner,

v.

JOHN F. MALLEY and/or MALCOLM E. NICHOLS,
Former Collectors,
Respondents.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF SAME.

O. WALKER TAYLOR,
Attorney for Petitioner.

L. H. LANE, Law Printer, 221 High Street, Boston.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.

ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices Thereof:

Your petitioner, Arthur C. Harvey Company, a corporation of Boston, Massachusetts, by O. Walker Taylor, its undersigned attorney, respectfully represents that it has been greatly aggrieved (1) by the judgment of the Circuit Court of Appeals for the First Circuit rendered herein on June 27, 1932 (60 Fed. (2) 97, Rec. pp. 63–70), and (2) more particularly by that Court's supplemental written opinion rendered on October 11, 1932 (unreported; Rec. pp. 77–79) denying the petitioner's motion to be heard on "the method of computing the petitioner's taxes for the six months period ended June 30, 1918" (Rec. pp. 81–92)—a question which was not raised or discussed orally or in the briefs, either at the trial in the District Court or at the hearing before the Circuit Court of Appeals, but was raised, for the first time, and ruled upon in the aforesaid opinion of the Circuit Court of Appeals on June 27, 1932.

In compliance with Section 2 of Rule 38 of this Court, the matters involved, stated as clearly and briefly as the inherent complexities of the case and the unusual proceedings thereon seem to permit, are as follows:

I. STATEMENT OF THE CASE.

1. The suit was brought by a writ dated January 25, 1930, to recover the sum of $74,648.39, with interest, which the Commissioner of Internal Revenue, on or about February 18, 1924, *actually approved and allowed* as an "*overpayment*" of the petitioner's income, excess-profits, and war-profits taxes for the six-months period ended June 30, 1918, *but thereupon wrongfully credited and applied to outlawed taxes for other years*, and, thereafter, *denied and disallowed, for the first time*, on December 17, 1929, solely to avoid the effect of *Section 609 of the Revenue Act of 1928* (45 Stat. 874; 26 U. S. C. A. 2609), which declares such credits to be *void*, whether made before or after the passage of that Act.

2. The petitioner, plaintiff-appellant below, seeks recovery of the said sum ($74,648.39) either (1) as "1918 taxes wrongfully collected and credited", as alleged in Count I of the plaintiff's declaration (Rec. pp. 3–8), or, (2) as "money had and received by the defendant Malley", as alleged in Count II of the plaintiff's declaration (Rec. p. 8).

3. The defendants answered separately, by way of general denials (Rec. pp. 9–10), and set forth no special defenses (1) as to the jurisdiction of the District Court, (2) as to any matters alleged in the declaration, or (3) as to any statute of limitation.

II. PETITIONER'S CONCESSION AS TO THE DEFENDANT NICHOLS.

1. When this suit was brought the question of the liability of a Collector who credited an allowed overpayment to outlawed taxes had not been settled; now, however, in view of the recent decision on that question by the Circuit Court of Appeals for the Sixth Circuit in the case of *Routzahn* v. *Reeves Brothers Company*, 59 Fed. (2) 915, in which this Court recently denied a writ of certiorari, the petitioner concedes and admits that it has no cause of action against the defendant Nichols.

2. The petitioner still contends, however, and respectfully submits to this Court that it has a good and just cause of action against the defendant Malley (1) either "for money had and received" or (2) upon its rejected claim for refund of the over-

payment of its 1918 taxes under Section 3226 of the United States Revised Statutes as amended, 26 U. S. C. A. 156, since this suit was brought within two years of the disallowance of a proper claim for refund seasonably filed.

III. STATEMENT OF THE FACTS AND STATUTES INVOLVED.

1. The petitioner, on March 14, 1919, having always kept its books of account on the basis of a fiscal year ending June 30th, filed a return for the six-months period ended June 30, 1918, pursuant to Section 212 (b) of the Revenue Act of 1918 (40 Stat. 1057), which actually overlapped and included a portion of the income which had already been included in its return for the year 1917—made on the calendar year basis—pursuant to the Revenue Act of 1917; and, on the basis of that *erroneous return* taxes were assessed in the amount of $302,524.65, of which the petitioner paid $227,063.26 to the defendant Malley, and, on April 9, 1923, having previously filed a corrected or amended return and a claim for the abatement of the balance of the assessment, the petitioner seasonably filed a proper claim for refund of $107,826.61 (Rec. pp. 47, 49).

2. The Commissioner did not make his examination of the returns and claims thus filed for the year 1918 until some time in 1923, when it was too late to assess or collect any taxes for the years 1915, 1916 and 1917, by credit or otherwise, and thereupon, after such examination the Commissioner (1) *accepted and approved the amended return*, (2) determined the original assessment to be excessive in the amount of $156,340.83, (3) abated the $75,461.39 thereof which had not been paid, and (4) *officially allowed the petitioner's claim for refund in the amount of $80,879.44*, all of which is clearly shown in the record by the following documents:

(1) The Commissioner's final letter of determination dated May 7, 1923 (Rec. p. 23);

(2) The Schedule of Overassment approved December 20, 1923 (Rec. p. 37);

(3) The Schedule of Refunds and Credits, approved February 18, 1924 (Rec. p. 37);

(4) Certificate of Overassessment No. 29,852 issued to the petitioner on May 16, 1924 (Rec. p. 31).

3. Thereupon, the defendant Nichols, who had then become Collector of Internal Revenue, acting under instructions from the Commissioner (Rec. p. 37), credited and applied $74,648.39 of the allowed overpayment of $80,879.44, to alleged underpayments of the petitioner's taxes for the years 1915, 1916 and 1917, after the expiration of the five-year period of limitation for the assessment and collection of any such taxes for those years, as provided in Section 250 (d) of the Revenue Act of 1921 (44 Stat. 265).

4. The Revenue Act of 1928 (45 Stat. 875; 26 U.S.C.A. 2609), which did not become effective until May 29, 1928, provides as follows:

> "*Section 609. Erroneous Credits.*
>
> (a) Credit against barred deficiency.—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607.
>
> . . . . . .
>
> (c) Application of section.—The provisions of this section shall apply to any credit made before or after the enactment of this Act."

5. In the light of this new legislation on the matter of such credits, the petitioner on July 27, 1929, filed a petition with the Commissioner of Internal Revenue (Rec. pp. 41–44) requesting that the $74,648.39, as previously allowed, should be refunded, since a sufficient claim therefor had been seasonably filed on April 9, 1923 (Rec. pp. 39–40).

6. Thereupon, solely to avoid to the effect of Section 609 of the Act of 1928, *supra*, the Commissioner of Internal Revenue *entirely repudiated his previous determination and allowance and denied that there had ever been any overpayment of the petitioner's 1918 taxes* and in a letter dated December 17, 1929 (Rec. p. 49) said:

> "The return for the six months' period above-mentioned apparently was filed to adjust the filing basis to a fiscal year and the tax was assessed on that basis. In the computation producing the overassessment of $156,340.83 the tax liability was computed under the basis of the net

income for the entire year taking 6/12 thereof as representing the tax for the six months' period ended June 30, 1918.

The proper method for computing the income for the six months' period in question is in accordance with the original return which you filed (Appeal of Henry D. Weed, 2 B. T. A. 84 and Appeal of Coghlen Electric Company, 3 B. T. A. 1071 and Section 226 of the Revenue Act of 1918).

. . . . . .

It is accordingly held that the overassessment was erroneously allowed, and, therefore, that portion of the overassessment which has not yet been refunded, having been credited against the tax liability for prior years, will not be refunded at this time. Your claim will be rejected in full. The rejection will officially appear on the next schedule to be approved by the Commissioner."

7. The foregoing letter of December 17, 1929, was the first time the Commissioner of Internal Revenue had ever (1) rejected the amended return, (2) denied that there had been an overpayment of the 1918 tax, or (3) disallowed the petitioner's claim of April 9, 1923; and this suit, as above stated, was begun on January 5, 1930, or "*within two years after the disallowance of the part of such claim to which such suit or proceeding relates*", as provided in Section 3226 of the United States Revised Statutes as amended (26 U. S. C. A. 156).

8. But, at the trial in the District Court, August 6, 1930, Counsel for the Government, again shifting positions, in open Court admitted (1) that the previous determination or allowance of the overpayment was right, (2) that the Certificate of Overassessment and the official Schedules were valid documents and (3) that the credits of the allowed overpayment to the assumed taxes for 1915, 1916 and 1917 had actually been made after the statute of limitations as to those years had run; and thereupon the District Court found and ruled (1) that the plaintiff, petitioner herein, *had made out a prima facie case*, and (2) that it was unnecessary for the plaintiff to proceed further by putting in evidence the original and amended returns and its

other proof, as your petitioner was ready, willing and, in fact, offered to do. (See colloquy, Rec. pp. 76D–76F.)

9. Thereupon the whole defense in the District Court was rested upon the contentions (1) that the Commissioner's letter of December 17, 1929 (Rec. pp. 49–50) was not a rejection of the petitioner's claim of April 9, 1923 (Rec. pp. 47–49), (2) that the plaintiff could not sue a collector in the District Court on an allowed claim and (3) that the suit was barred by the statute of limitations.

10. The District Court also shifted its position and did not adhere to its findings and rulings thus *"made in the course of the trial"* but thereafter, on September 28, 1931, notified counsel by letter that the case would be decided *"on a question which was not discussed at the hearings or noticed in the briefs"* (see Rec. opp. p. 76G) and in its written opinion (50 Fed (2) 885; Rec. pp. 56–59) the District Court held and ruled as follows:

> "In the case before the Court no refund could be made to the plaintiff because no claim has ever been filed for a refund of taxes for the years 1915, 1916 or 1917. As no refnnd could be made, the credit is not void."

11. The petitioner seasonably perfected an appeal (Rec. pp. 14–22) whereupon the case came on for hearing and was argued before the Circuit Court of Appeals on April 14, 1932 and there Counsel for the Government again admitted in open Court (1) that the Commissioner's determination of May 7, 1923 (Rec. pp. 23–26) was right; (2) that the claim for refund was actually allowed, but (3) insisted that a collector cannot be sued on an allowed claim; and neither in the oral arguments nor in the briefs, either in the District Court or in the Circuit Court of Appeals, was it ever contended or intimated that the petitioner's taxes for the six months' period ended June 30, 1918 should be computed under Section 226 of the Revenue Act of 1918 (40 Stat. 1057), or that there had been no overpayment.

12. The Circuit Court of Appeals, in turn, entirely disregarded the admissions of Government counsel, thus made in open Court, to the effect that the previous determination *was right*, as well as all of the other documentary proof thereof

above referred to, and held that the determination *was wrong* and that the taxes for the six months period should be computed under Section 226 of the 1918 Act (40 Stat. 1075).

13. Although the defense failed to put in evidence (1) the return, or (2) any figures whatsoever upon which any such computation under Section 226 can be made, in its opinion (Rec. pp. 69–70) the Circuit Court of Appeals comments and holds as follows:

> "The record shows that when the second claim for refund was filed in July, 1929, the Commissioner, apparently under advice of counsel, made a redetermination of the 1918 tax for the six months from December 31, 1917, to July 1st, 1918 which he had a right to do, though he could not collect any additional tax, *Lewis* v. *Reynolds*, *supra*, and found that the previous assessment in May, 1923, which showed an overpayment of $74,648.39, was erroneous, the former computation having been based on Section 205 of the 1918 Act.
>
> . . . . . .
>
> Determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65, less the abatement of $75,461.39 so far as anything appears in the record, was correct, and there was, therefore, no overpayment. At least, the record does not disclose any error. The burden in such cases, in an action against a collector for money had and received, is on the plaintiff to show that the Government has money justly belonging to the plaintiff. This burden the appellant has not sustained in this case."

14. "The former computation—based on Section 205 of the 1918 Act", *was actually made and is presented in evidence and is shown in the record*, together with the items of gross income and deductions whereon the Commissioner, *officially and in fact*, made the computation and determined (1) that the original assessment of $302,524.65 was wrongful and excessive in the amount of $156,340.83 and (2) that the petitioner's taxes for the six-months period amounted to only $146,098 (Plaintiff's Exhibit 1; Rec. pp. 24–26); *but*, this record fails entirely to disclose

(1) any *actual official computation* under Section 226, (2) either the petitioner's original or amended return, (3) the amount of the net income, or any figures whatsoever upon which such computation can be made, to show that: "determined under Section 226, the tax assessed in 1919 on the taxpayer's original return of March, 1919, to the amount of $302,524.65 less the abatement of $75,461.39 . . . was correct".

15. The pertinent parts of the two disputed sections are as follows:

(*1*) *Section 205* (*40 Stat. 1061*).

"Sec. 205 (a). That if a taxpayer makes a return for a fiscal year beginning in 1917 and ending in 1918 his tax under this title for the first taxable year shall be the sum of: (1) the same proportion of a tax for the entire period computed under Title I of the Revenue Act of 1916 as amended by the Revenue Act of 1917 and under Title I of the Revenue Act of 1917, which the portion of such period falling within the calendar year 1917 is of the entire period, and (2) the same proportion of a tax for the entire period computed under this title at the rates for the calendar year 1918 which the portion of such period falling within the calendar year 1918 is of the entire period. . . ."

(*2*) *Section 226* (*40 Stat. 1075*).

"Sec. 226. That if a taxpayer, with the approval of the Commissioner, changes the basis of computing net income from fiscal year to calendar year a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is from calendar year to fiscal year, a *separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated at the close of the fiscal year.*

. . . . . .

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for

the calendar year in which such period is included; and the credits provided in subdivision (c) and (d) of section 216 shall be *reduced respectively to amounts which bear the same ratio to the full credits provided in such subdivisions as the number of months in such period bears to twelve months.*" (Italics supplied.)

16. Thereafter, by reason of the fact that the question of the *method of computation or the meaning of the two sections above referred to had not been mentioned or discussed throughout the entire proceedings, either in the District Court or in the Circuit Court of Appeals*, your petitioner seasonably filed a petition for a re-hearing before the Circuit Court of Appeals (Rec. pp. 78-80), which was denied by an order of that Court dated August 5, 1932 (Rec. p. 80).

17. Whereupon the petitioner filed a motion to be heard in oral argument "*limited solely to the matter of the computation of the tax*", and therein (1) submitted to the Circuit Court of Appeals *an actual computation under Section 226*, and (2) contended if the computation should be made by the apportionment of the gross income and deductions for its fiscal year ended June 30, 1918, "*pro rata to the taxable fiscal period in order to arrive at the net income for the latter*" its true, actual and correct tax would be only $146,098 (Rec. pp. 89-90).

18. In support of the allowance of that motion counsel for the petitioner quoted the following language of Mr. Justice Stone in the case of the *American Hide and Leather Company* v. *United States*, 284 U. S. 343, 351; 52 S. Ct. 154:

> "Section 226 of the 1918 act authorizes the calculation of the tax for that part of a fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed*, 2 B. T. A. 84."

19. Your petitioner relied and still relies upon the case of the American Hide and Leather Company and the language of Mr. Justice Stone in the opinion of that case being directly in point, but in its opinion of October 11, 1932 (Rec. pp. 77-79) the Cir-

cuit Court of Appeals comments upon that language and holds as follows:

> "Counsel contends, apparently basing his contention on some language in the opinion in *American Hide & Leather Company* v. *United States*, 284 U. S. 343, 351, that the gross income and deductions for the entire fiscal year of 1917–1918 should be apportioned to the part of the fiscal year falling in 1918, and the tax computed on the net income thus obtained for that period, which of course, assuming the gross income and deductions are agreed to, would produce the same result as if computed under Sec. 205.
>
> But the question of how the tax should be computed under Sec 226 was not in issue in the American Hide & Leather Company case, and the language in the opinion on which counsel relies, being obviously dictum, should not control this Court, since it is not only contrary to the language of the statute, but would produce inequitable results."

20. In all of the foregoing your petitioner respectfully submits to this Honorable Court that there have been manifold errors and irregularities throughout the entire proceedings on the case, to wit:

IV. ASSIGNMENTS OF ERROR.

First: The Circuit Court of Appeals erred in refusing to consider and pass upon the questions decided by the District Court.

Second: The Circuit Court of Appeals erred in deciding the case on an entirely different theory from that upon which the case was presented for its decision in the oral arguments and the briefs submitted in that Court and by the opinion of the District Court.

Third: The Circuit Court of Appeals erred in holding that "determined under Section 226 (of the Revenue Act of 1918) the tax assessed in 1919 on the taxpayer's original return of March, 1919 to the amount of $302,524.65 less the abatement of $75,461.39, so far as anything appears in the record was correct and there was, therefore, no overpayment", *because* both (1) the Certificate of Overassessment (Rec. p. 31) and (2)

the official Schedule of Overassessment (Rec. p. 37) shows that the original assessment of $302,524.65 was wrongful and excessive in the amount of $156,340.83.

Fourth: The Circuit Court of Appeals erred in failing to hold and rule that the correct amount of the petitioner's taxes for the six months period ended June 30, 1918 was, and is, *only $146,098*, as conclusively shown by the Commissioner's letter of May 7, 1923, in which he officially determined the correct amount of the taxes to be $146,098 (Plaintiff's Exhibit 1; Rec. p. 26).

Fifth: The Circuit Court of Appeals erred in holding that the appellant, petitioner herein, has not sustained the burden of showing that "the Government has money justly belonging to the plaintiff", by reason of the following facts:

1. The official schedule of Refunds and Credits (Rec. p. 37) conclusively shows that the plaintiff actually overpaid its taxes in the amount of $80,879.44 which includes the $74,648.39 sought to be recovered in this suit.

2. The admission of counsel for the Government, in open Court, both in the District Court (Rec. p. 76E) and in the Circuit Court of Appeals to the effect (1) that the Commissioner's Certificate of Overassessment (Rec. p. 31) is a valid document and (2) that the overpayment of the 1918 tax thereby allowed had been credited and applied to alleged taxes for the earlier 1915, 1916 and 1917 after the statute of limitations as to those years had run.

3. The District Court found and ruled that the plaintiff had made out a *prima facie* case on the basis of the Certificate of Overassment (Rec. p. 76E) and the entire opinion of the District Court is predicated on a finding of fact that the petitioner did actually overpay its 1918 taxes.

Sixth: The Circuit Court of Appeals erred in making a new finding of fact to the effect that the Commissioner "made a redetermination of the 1918 tax for the sixth months period from December 31, 1917 to July 1, 1918, which he had a right to do", since the fact in that regard found by the District Court is directly to the contrary.

Seventh: The Circuit Court of Appeals erred in failing to consider the real issues of the case as presented in the pleadings, in the oral arguments and in the briefs.

Eighth: The Circuit Court of Appeals erred in affirming the judgment of the District Court.

V. GROUNDS FOR THE ALLOWANCE OF A WRIT OF CERTIORARI.

First: The case involves the interpretation of important Federal statutes which have been the source of much litigation, the meaning of which is unsettled and an interpretation of which, by this Court, in their application to the facts in the case at bar, would be of great public interest and concern.

(1) *Section 3226 R. S., as amended; 26 U. S. C. A. 156;*
(2) *Section 205 of the Revenue Act of 1918, 40 Stat. 1061;*
(3) *Section 226 of the Revenue Act of 1918, 40 Stat. 1075;*
(4) *Section 609 of the Act of 1928, 45 Stat. 875; 26 U. S. C. A. 2609.*

Second: The opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

American Hide & Leather Co. v. *United States*, 284 U. S. 343;
Bonwit Teller & Co. v. *United States*, 283 U. S. 258; 51 S. Ct. 395;
Lewis v. *Reynolds*, 284 U. S. 281; 51 S. Ct. 145.

Third: The opinion of the Circuit Court of Appeals is in conflict with the applicable decisions of the United States Board of Tax Appeals which have been sanctioned by this Court:

Appeal of Henry D. Weed, 2 B. T. A. 84 (no appeal taken);
Appeal of Pasco Robles Mercantile Company, 12 B. T. A. 750;
(*Affirmed C. C. A. Ninth Circuit; 33 Fed. (2) 653.*)
(*Certiorari denied, 280 U. S. 595.*)

Fourth: The opinion of the Circuit Court of Appeals violates the well established rule (1) that Courts of Review will consider only those questions which have been ruled upon by the lower Court and (2) that the parties on appeal must adhere to the theory on which the case was prosecuted or defended in the lower Court.

San Juan Light & Tr. Co. v. *Requena*, 224 U. S. 89;
Tucker v. *Alexander*, 48 S. Ct. 45; 275 U. S. 228;
Unites States v. *Mitchell*, 46 S. Ct. 418; 271 U. S. 9.

Fifth: The Circuit Court of Appeals erred in ***disregarding the fact*** that the District Court ***found and ruled that the plaintiff had actually overpaid*** its 1918 taxes and that the opinion of the District Court is based ***entirely upon the fact of such overpayment.***

Sixth: The Circuit Court of Appeals erred in holding that upon all the evidence the appellant, petitioner herein, had failed to sustain the burden of proving that it had actually made an overpayment of its 1918 taxes, thus disregarding the following documentary evidence in the record which conclusively proves to the contrary:

(1) The Commissioner's final letter of determination dated May 7, 1923 (Rec. p. 23);
(2) The Schedule of Overassessment approved December 20, 1923 (Rec. p. 37);
(3) The Schedule of Refunds and Credits, approved February 18, 1924 (Rec. p. 37);
(4) Certificate of Overassessment No. 29,852 issued to the petitioner on May 16, 1924 (Rec. p. 31).

Seventh: Throughout the entire proceedings on the case both in the District Court and in the Circuit Court of Appeals there have been manifold errors, irregularities and uncertainties as to the real issues involved in the case with the result that the petitioner has not been granted a fair and just trial and decision of the cause of action for which this suit was brought.

CONCLUSION.

Wherefore your petitioner earnestly prays that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled *Arthur C. Harvey Company, Plaintiff, Appellant*, v. *John F. Malley, Former Collector of Internal Revenue, and/or Malcolm E. Nichols, Former Collector of Internal Revenue, Defendants, Appellees*, being designated and numbered on its docket *October Term, 1931, No. 2667*, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court to the end that your petitioner may have the relief herein prayed for, and such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

Respectfully submitted,

ARTHUR C. HARVEY COMPANY,
by its Attorney, O. WALKER TAYLOR,
11 Beacon Street, Boston, Massachusetts.

AFFIDAVIT OF COUNSEL.

COMMONWEALTH OF MASSACHUSETTS.
SUFFOLK, SS. BOSTON, MASSACHUSETTS, November 18, 1932.

Then personally appeared the above-named O. Walker Taylor, a member of the bar of the Supreme Court of the United States, and being duly sworn deposed and said that he prepared and signed the foregoing petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit; that the same was prepared with the full knowledge, consent and approval, and at the suggestion of the Arthur C. Harvey Company, a corporation with a usual place of business at Boston, Massachusetts; that the facts stated in the said petition are true to the best of

his knowledge and belief; and that there are good, sufficient and just grounds for the issuance of the writ of certiorari therein prayed for.

Before me, FRANK J. LINEHAN, JR.,
[SEAL] *Notary Public.*

My commission expires October 22, 1937.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No.

ARTHUR C. HARVEY COMPANY, PETITIONER,

v.

JOHN F. MALLEY AND/OR MALCOLM E. NICHOLS, FORMER COLLECTORS, RESPONDENTS.

BRIEF IN SUPPORT OF THE PETITION.

I. STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked under the Act of February 3, 1925, c. 229, Sec. 1 (43 Stat. 938; 28 U. S. C. A. 347).

2. By an order signed by Mr. Justice Stone, and filed with the Clerk of this Court, on October 24, 1932, the time for the petitioner to apply for a writ of certiorari was extended for thirty days from November 4, 1932 and this petition was seasonably filed within the period as thus extended.

3. The opinions of the Courts below of which a review by this Court is petitioned for are:

(1) The opinion of the District Court for the District of Massachusetts (Rec. pp. 56–59), reported in *50 Fed. (2) 885.*

(2) The opinion of the Circuit Court of Appeals for the First Circuit (Rec. pp. 69–70), reported in *60 Fed. (2) 97*, and

(3) The supplemental written opinion of the Circuit Court of Appeals (Rec. pp. 77–79), as yet unreported.

II. STATEMENT OF THE FACTS AND THE LAWS.

The essential facts of the case, together with the pertinent parts of the applicable statutes have been presented in the petition. Any other facts or statutes requiring consideration are referred to in the argument below. In support of the allowance of the petition the following is respectfully submitted.

III. SUMMARY OF THE ARGUMENT.

I. The Judgment of the Circuit Court of Appeals is directly in conflict with the applicable decisions of this Court.

II. The Judgment of the Circuit Court of Appeals is directly in conflict with the applicable decisions of the Board of Tax Appeals as sanctioned and approved by this Court.

III. The Judgment of the Circuit Court of Appeals violates the well established rule that a Court of review must adhere to the theory upon which the case was presented and decided by the lower Court.

IV. The Judgment of the Circuit Court of Appeals is not supported by the great weight of the evidence as presented in the record.

V. The case involves the interpretation of important Federal statutes which have been the source of much litigation, are still unsettled, and of which an interpretation by this Honorable Court will be of great public interest and concern.

ARGUMENT.

I.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In support of this contention, attention is invited to the comments in the opinions of some of the more recent leading cases decided by this Court as compared to the comments and holdings in the opinion of the Circuit Court of Appeals.

American Hide & Leather Co. v. *United States*, 284 U. S. 343; 52 S. Ct. 154;
United States v. *Michel*, 282 U. S. 656; 51 S. Ct. 284;
Bonwit Teller & Co. v. *United States*, 283 U. S. 258; 51 S. Ct. 395;
Lewis v. *Reynolds*, 284 U. S. 281; 51 S. Ct. 145.

1. On the question of the computation of the tax:

In the case of the American Hide & Leather Company, *supra*, the taxpayer had a fiscal year ending June 30, 1918 exactly as in the case at bar. In commenting upon the method of computing the tax for the six months period under Section 226 of the 1918 Act (40 Stat. 1075), Mr. Justice Stone in that case said:

> "Section 226 of the 1918 act authorizes the calculation of the tax for that part of the fiscal year falling between the beginning of the calendar year and the end of the fiscal year by the apportionment of gross income and deductions for the fiscal year, pro rata to the taxable fiscal period, in order to arrive at net income for the latter. See *Appeal of Weed*, 2 B. T. A. 84."

The Circuit Court of Appeals in its supplemental opinion (Rec. p. 79) holds that the language above referred to is "obviously dictum" and would produce inequitable results and presents the following illustrations:

> "To illustrate: Let us assume that the plaintiff corporation had a taxable income during the period from June 30,

1917, to January 1, 1918, of $50,000, on which, since it made its return for the year 1917 on the basis of the calendar year, it had already paid a tax under the 1916 Act, and from December 31, 1917, to July 1, 1918, its taxable income was $150,000. Applying the theory of the plaintiff's counsel, it would in such case be taxed on an income of only $100,000 during the period from December 31, 1917, to July 1, 1918, although its taxable income during that period was $150,000. In other words, under such an interpretation of Sec. 226 it would escape taxation on $50,000.

To state the converse of this: Assuming that its taxable income during the last half of the calendar year of 1917 was $150,000, and for the first half of 1918 was only $50,000, the taxpayer under the 1916 Act, making a return for the calendar year of 1917, would have already paid a tax on $150,000 of income; yet, according to the theory of counsel for the plaintiff, its return for the period of the fiscal year falling in 1918 should show a taxable income of $100,000, and as a result he would not only pay a tax on the $50,000 actually earned in the period of the fiscal year falling in 1918, but a double tax on $50,000 more earned in 1917."

Not only is the above language of the Circuit Court of Appeals in conflict with the language of this Court but it is also true that there are no figures in this entire record which show what the actual income of the petitioner was during the six months period. This question was not raised in the District Court and neither the Court nor the parties considered such figures necessary in view of the fact that the defendant admitted in open Court that the Certificate of Overassessment and other documents were valid, all of which were based upon a computation of the tax under Section 205 of the Act as is shown in the Commissioner's official letter of determination (Rec. p. 26).

2. On the question of a suit against the Collector:

The opinion of the Circuit Court of Appeals (Rec. pp. 68-69) comments as follows:

"If the appellant had declared as on an account stated,

or a promise to pay by reason of the certificate of overassessment issued by the collector in May, 1923, as in *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 265, we think its action would have to be brought against the United States, as neither of the defendants had anything to do with issuing of the certificate of overassessment or were privy to any promise therein contained, either express or implied, to refund the overpayment."

In the case at bar, the appellant, petitioner herein, did not base its suit on the Certificate of Overassessment, as in the *Bonwit Teller* case, because the Commissioner's letter of December 17, 1929 (Rec. pp. 45-46), clearly states that there was never any overpayment of the 1918 taxes, or, in other words, that the Certificate of Overassessment was erroneously issued. This letter, your petitioner accepted in good faith for what it purports to be—a denial of the claim, made on April 9, 1923, that there had been such overpayment. This suit, therefore, was brought against the defendant Malley, who actually collected the $74,648.39, here in dispute, in the hope and expectation that thereby the plaintiff would be granted opportunity to have the Court determine: (1) whether the Certificate of Overassessment was in fact erroneously issued, (2) whether the Commissioner's letter of December 17, 1929, *supra*, was in fact a bona fide denial that there had been any overpayment, or (3) whether upon all the evidence which the plaintiff was ready, able and offered to present for the consideration of the Court, it had actually and in fact overpaid its 1918 taxes.

(1) As a first form of action, therefore, the plaintiff, petitioner herein, sued on the theory that its claim for refund of April 9, 1923, *supra*, was actually and officially rejected, for the first time, by the Commissioner of Internal Revenue on December 17, 1929. The suit was brought within two years of that first and only denial or disallowance of the claim, as required by Section 3226 of the United States Revised Statutes (26 U. S. C. A. 156), the pertinent part of which is as follows:

". . . No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon

> within that time, nor after the expiration of five years from the date of the payment of such tax . . . unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates."

The opinion of this Court in the case of *United States* v. *Michel, supra*, seems clearly to hold that a suit may be brought upon a rejected claim for refund even though the "disallowance" takes place more than five years from payment, provided such suit is brought within two years of the first actual official rejection or disallowance of the claim. The claim for the refund of the $74,648.39 sought to be recovered in the case at bar was first asserted on April 9, 1923. That claim was never questioned, denied or disallowed until December 17, 1929. Clearly, therefore, the suit was brought "within two years after the disallowance of the part of such claim to which such suit or proceeding relates" as required by the statute. In the *Michel* case, *supra*, Mr. Justice Butler in construing the statute said:

> "By the terms of the statute the period within which the Government consented to be sued commenced at the expiration of such six months, and continued uninterruptedly through the five-year period following the date of payment *and until 'two years after the disallowance'.*" (Italics supplied.)

On the strength of the wording of the statute itself and these comments, your petitioner respectfully submits (1) that the suit was properly brought against the defendant Malley for the recovery of the 1918 overpayment, (2) that it was not limited to a suit against the United States or to an action in the Court of Claims, as was contended by Counsel for the Government before the Circuit Court of Appeals.

(2) As a second form of action the suit was brought against the defendant Malley on the theory of "money had and received" of which the Certificate of Overassessment may or may not be sufficient proof. At the trial of the case the plaintiff was taken completely by surprise because counsel for the Government confused and avoided the issues (1) by repudiating the Com-

missioner's letter of December 17, 1929, *supra*, (2) by admitting that the Certificate of Overassessment was a valid document and (3) by arguing that the plaintiff's only remedy was a suit against the United States "on an allowed claim" brought in the Court of Claims. Upon these admissions the District Court ruled that the plaintiff had made out a ***prima facie*** case and that it was unnecessary for the plaintiff to proceed further by putting in its further proof (Rec. p. 76E). Clearly the District Court accepted jurisdiction of the case.

Even if the Certificate of Overassessment is a valid document and constitutes an allowance of the petitioner's claim of April 9, 1923, as the District Court found and ruled, that fact does not preclude the plaintiff from suing the collector to whom either the "tax" or "the money" was actually paid.

United States Revised Statutes, Sec. 629 (28 U. S. C. A. 41 (5)).
Downes v. *Bidwell*, 182 U. S. 244; 21 S. Ct. 770.
Klump v. *Thomas* (C. C. A. 7th), 162 Fed. 853, 856.

Section 629 of the Revised Statutes, *supra*, as amended, provides:

> "The District Courts shall have original jurisdiction as follows: . . . . . .
>
> Fifth. Of all cases *arising under any law providing for Internal Revenue*, or from revenue from imports or tonnage, except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. § 563, par. 5, § 629, par. 4; Mar. 3, 1911, c. 231, § 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

In the case of *Downes* v. *Bidwell, supra*, Mr. Justice Brown interpreted the foregoing section to mean that any actions, arising under an act providing for revenue, might be maintained against the collector "since they are for acts done by a collector under color of his office". Nor, does there seem to be anything in the case of Bonwit Teller & Company, *supra*, to the contrary. While there the suit was actually brought against the United States and based upon the Certificate of Overassessment, there is nothing in that opinion to indicate that the same

suit might not have been brought against the Collector for "money had and received" as "evidenced by" the Certificate of Overassessment.

It is respectfully submitted, therefore, that these findings and ruling of the District Court were binding, and that the Circuit Court of Appeals erred in its foregoing comments and holdings.

3. On the question of recoverable overpayment:

On this question the Opinion of the Circuit Court of Appeals (Rec. p. 69) quotes the following language from the Opinion of this Court in the case of *Lewis* v. *Reynolds, supra:*

> "Although the statute of limitations may have barred the assessment and collection of any additional sum, it does not obliterate the right of the United States to retain payments already received when they do not exceed the amount which might have been properly assessed and demanded."

It is respectfully submitted that the above language has absolutely no application to the facts and circumstances in the case at bar. In the case of *Lewis* v. *Reynolds, supra,* taxes for only one year were involved. A claim for refund had been filed on one ground which the Commissioner found should be allowed but in making his examination he found that there were other items for the same year which more than offset the overpayment to which the taxpayer might otherwise have been entitled. The facts in that case are thus clearly distinguishable from those in the case at bar, and it is respectfully submitted that the language of this Court in the *Lewis* v. *Reynolds* case was not intended to mean that where a taxpayer proved an actual overpayment for *one year,* refund might be refused and the overpayment applied to alleged taxes for other years already barred by the statute of limitations. Such an interpretation of the statute would be clearly in conflict with Sections 607 and 609 of the Revenue Act of 1928 (45 Stat. 874, 875; 26 U. S. C. A. 2607, 2609).

For all of the foregoing reasons, therefore, your petitioner respectfully submits that the decision of the Circuit Court of Appeals is directly in conflict with the applicable decisions of this Court.

II.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS DIRECTLY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THE BOARD OF TAX APPEALS AS SANCTIONED AND APPROVED BY THIS COURT.

On the matter of the computation of the tax under Section 226 of the Revenue Act of 1918, *supra*, the opinion of the Circuit Court of Appeals has entirely misinterpreted two leading cases of the United States Board of Tax Appeals, one of which is cited in its opinion.

Appeal of Henry D. Weed, 2 B. T. A. 84;
Appeal of Paso Robles Mercantile Company, 12 B. T. A. 750.

The case of the *Appeal of Henry D. Weed supra*, is cited with approval both in the opinion of the Circuit Court of Appeals in the case at bar and also by this Court in the case of the American Hide & Leather Company case, *supra*. The Board of Tax Appeals in that case held that the tax should be computed under Section 226 of the 1918 Act but this ruling by the Board was based upon the following finding of fact in the Weed case:

> "5. In his return for the five months period ended May 31, 1918, the taxpayer reported five-twelfths of his net income for his fiscal period ended May 31, 1918."

Your petitioner contends that the Circuit Court of Appeals entirely disregarded this finding of fact in the Weed case. In the case at bar the Commissioner of Internal Revenue officially determined that the petitioner's total net income for its entire fiscal year ended June 30, 1918, was $495,390.40. If six-twelfths of this amount should be taken as the petitioner's correct income for the six months period exactly as was done in the Weed case, your petitioner's taxes for the six months period would be only $146,098 as was demonstrated and shown to the Circuit Court of Appeals in the appellant's motion (Rec. pp. 89–90). It is thus apparent that this record is sufficiently full and complete to calculate the petitioner's taxes for the six months period either under Section 205 or in the manner prescribed in

the Weed case. But there are, as we have stated above, absolutely no figures upon which such a computation as the opinion of the Circuit Court prescribed can be made. The erroneous return upon which the original assessment of $302,524.65 was made is not shown in the record. The plaintiff below was ready, able and in fact offered to show that the net income reported on the original return of March, 1919 was not the petitioner's true income for the six-months period, as the Circuit Court of Appeals assumed, but actually included what the petitioner conceived to be its income of the entire fiscal year. In the very nature of the case this overlapped or duplicated a portion of the income which was shown in its return for the calendar year ended December 31, 1917. It is respectfully submitted, therefore, that the method of computation under Section 226 as prescribed in the supplemental opinion of the Circuit Court of Appeals (Rec. p. 79) is contrary to the statute, is not supported by the evidence and is inconsistent with the method of computation under that section as prescribed in the appeal of Henry D. Weed, by the Board of Tax Appeals which was sanctioned and approved by this Court in the case of the American Hide & Leather Company, *supra.*

III.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS VIOLATES THE WELL ESTABLISHED RULE THAT A COURT OF REVIEW MUST ADHERE TO THE THEORY UPON WHICH THE CASE WAS PRESENTED TO AND DECIDED BY THE LOWER COURT.

In the case at bar the whole opinion of the District Court is predicated upon the fact that the petitioner *had actually overpaid its 1918 taxes*, while that of the Circuit Court of Appeals is predicated entirely on the fact that the petitioner *did not make such overpayment.* It is respectfully submitted that the fact of the overpayment so clearly found by the District Court was binding upon the Circuit Court of Appeals and that it was limited to issues of fact and of law decided and passed upon by the District Court. It is a universal rule with few exceptions that Courts of Review will consider only those questions which have been presented and ruled upon by the lower Court

and that the parties on appeals must adhere to the theory on which the case was prosecuted or defended in the lower Court.

San Juan Light & Tr. Co. v. *Requena,* 224 U. S. 89;
Tucker v. *Alexander,* 48 S. Ct. 45; 274 U. S. 228;
United States v. *Mitchell,* 46 S. Ct. 418; 271 U. S. 9.

In the case of *Tucker* v. *Alexander, supra,* Mr. Justice Stone said:

> "In our view of the case the question considered by the Circuit Court of Appeals was not properly before it and it should have passed upon the merits. During the entire course of the trial no question was raised as to the sufficiency of the claim for refund. The only substantial issue litigated was the correctness of the Commissioner's deduction of the distribution of May, 1913."

IV.

THE JUDGMENT OF THE CIRCUIT COURT OF APPEALS IS NOT SUPPORTED BY THE GREAT WEIGHT OF THE EVIDENCE AS PRESENTED IN THE RECORD.

The holding of the Circuit Court of Appeals to the effect that there was no overpayment of the petitioner's 1918 taxes and that the appellant as plaintiff below had failed to sustain the burden of proof in that regard is clearly in error for the following reasons:

1. The District Court found and ruled that the petitioner had actually overpaid its 1918 taxes as shown both in that Court's finding and ruling during the course of the trial (Rec. p. 76) as well as in its opinion (Rec. p. 59).

2. Counsel for the Government admitted in open Court both in the District Court and before the Circuit Court of Appeals that the Certificate of Overassessment (Rec. p. 31) and the official Schedules of the Commissioner of Internal Revenue (Rec. p. 37), which conclusively show the overpayment, were valid documents and the documents themselves were offered in evidence as defendants' exhibits.

3. The Commissioner's letter of May 7, 1923, is the only official determination of the petitioner's taxes for the six months period and clearly shows that there had been an overassess-

ment of $156,340.83 (Rec. p. 24), of which the $74,638.39 overpayment involved in this suit is a part.

4. The Commissioner's letter of December 17, 1929, in the light of (1) the foregoing finding of fact by the District Court, (2) the admission of counsel for the defendants in open Court and (3) the documents above referred to, is clearly shown to be insufficient to support the conclusion reached by the Circuit Court of Appeals.

It is respectfully submitted, therefore, that no question in regard to whether or not the petitioner had overpaid its taxes for 1918 or in regard to the method of computing the taxes for the six months period was presented for the decision of the Circuit Court of Appeals and that its comments and conclusions on these questions are clearly in error and should be reversed by this Honorable Court.

V.

THE CASE INVOLVES THE INTERPRETATION OF IMPORTANT FEDERAL STATUTES WHICH HAVE BEEN THE SOURCE OF MUCH LITIGATION, ARE STILL UNSETTLED AND OF WHICH AN INTERPRETATION BY THIS HONORABLE COURT WILL BE OF GREAT PUBLIC INTEREST AND CONCERN.

The petitioner respectfully submits that the case at bar presents the following questions which should be decided by this Court:

1. Whether the Circuit Court of Appeals erred in its interpretation of Sections 205 and 226 of the Revenue Act of 1918 as applied to the facts and circumstances in this case.

2. Whether the Circuit Court of Appeals erred in holding (1) that the Commissioner of Internal Revenue had a right to redetermine, in 1929, the petitioner's 1918 taxes, and (2) that the petitioner, plaintiff-appellant below, failed to sustain the burden of proving that there was *an actual overpayment of its 1918 taxes.*

3. Whether the petitioner, plaintiff-appellant below, has a good cause of action against the defendant Malley as Collector of Internal Revenue, to whom the disputed $74,648.39 was actually paid, by virtue of the fact (1) that a proper claim for

refund therefor was seasonably filed, and (2) that Section 609 of the Revenue Act of 1928 provides that the credit and application thereof was "*void*".

4. Whether the Circuit Court of Appeals erred in failing to consider the issues presented (1) in the pleadings, (2) in the opinion of the District Court, and (3) in the oral arguments and in the briefs.

5. Whether the Commissioner's letter of December 17, 1929 (Rec. p. 46) is not, in fact and in law, a "disallowance" of that part of the petitioner's claim for refund of April 9, 1923 (Rec. p. 49), to which this suit relates, so that as to the defendant Malley the action is not barred by the provisions of Section 3226 of the Revised Statutes (26 U. S. C. A. 156).

6. Whether in view of the facts and circumstances of the case the petitioner has had a full and fair adjudication of the cause of action for which the suit was brought.

The opinion of the Circuit Court of Appeals in the case at bar has already been the source of much speculation and interest and an adjudication of the foregoing questions by this Honorable Court would be of great public interest and concern. Particularly is this true as regards the meaning and effect of Section 609 of the Revenue Act of 1928 which declares a credit to an outlawed tax to be void whether or not such credit was made before or after the passage of the Act of 1918. While there have been numerous suits brought as a result of this section, no Court, as yet, has interpreted its full meaning and effect.

Where the Commissioner has determined an overpayment, and had issued a valid certificate therefor, but has wrongfully applied the overpayment, the status of the "overpaid tax" or the "money" is still uncertain. Clearly the Government has money which belongs to the taxpayer. We respectfully submit that this Honorable Court should decide whether or not it was the purpose and intent of Section 609 of the Act that "the tax" or "the money" should be refunded to the taxpayer.

Since the passage of the 1928 Act various theories have been advanced as to the meaning of Section 609. One is that, upon the passage of the 1928 Act, the taxpayer had a right to sue

for "taxes" for the year for which the overpayment was made. Another theory is that the money thus credited is not a tax but represents a sum of money due from the United States. Still another theory is that upon the passage of the Act there arose an *implied trust* either on the part of the collector to whom the money was actually paid or on the part of the United States to hold the money for the benefit of the person to whom it is rightfully due. See:

United States v. *Wardwell*, 172 U. S. 48; 19 S. Ct. 86.

The Commissioner of Internal Revenue, in the instant case, failed squarely to meet these issues. When the 1928 Act was passed a petition was filed on the ground that the credits were void and the originally allowed refund of the 1918 tax should be made to the extent of the wrongful credits. In order to avoid this issue the Commissioner *denied that there had ever been any overpayment of the 1918* tax. By the letter of December 17, 1929, he repudiated his previous determination, the Certificate of Overassessment and all of the other official documents. At the trial, however, Counsel for the Government repudiated the letter of December 17, 1929. The District Court held and ruled that the Certificate of Overassessment was valid and that the Government was bound by the admission of that fact made in open Court. The Circuit Court of Appeals, in turn, disregarded all these things and seems to rest its opinion solely on the letter of December 17, 1929, but nevertheless holds that the letter does not constitute a rejection of the original claim for the $74,648.39.

The defendants' answer in this case (Rec. pp. 9–10) raises no issue whatever in regard to the matter of filing a claim for refund for the years 1915, 1916 and 1917, the issue upon which the decision of the District Court rests. They contain no reference to the question of the computation of the petitioner's taxes under Section 226 of the Act, as decided by the Circuit Court of Appeals. No mention of either of these issues was made in the oral arguments and briefs in either Court. The result is that the petitioner at every turn in the proceedings has been taken completely by surprise, and there has never been a meeting of the minds of the parties or of the Courts as

to the merits of the cause of action for which the suit was brought.

In the case of *Howbert* v. *Penrose*, 38 Fed. (2) 577, 581, the Circuit Court of Appeals for the Tenth Circuit, McDermott, Circuit Judge, said:

> " The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to recover this tax. The defendant concedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc., R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, 56, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is that substance should be given the right of way over form.*
>
> . . . . . .
>
> The claim for refund should have been more particular; *but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer.* The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

CONCLUSION.

WHEREFORE, under all of these unusual circumstances, it is respectfully submitted that the petition for a writ of *certiorari* should be granted.

By O. WALKER TAYLOR,
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